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CHARLES ELMORE CROPLEY
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No. 22.

In the Supreme Court of the United States

October Term, 1929.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

GUARDIAN TRUST COMPANY, *Respondent.*

PETITION FOR REHEARING OF RESPONDENT, GUARDIAN TRUST COMPANY.

JUSTIN D. BOWERSOCK,
ROBERT B. FIZZELL,
JOHN F. RHODES,
Attorneys for Respondent.

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Now comes Guardian Trust Company, respondent herein, and respectfully petitions the court to set aside the decision and judgment heretofore on February 24, 1930, rendered herein, and grant respondent a rehearing in this cause, for the reasons hereinafter stated:

The decision of this court gives effect to a decree of the Circuit Court of Appeals and holds such decree conclusive, upon an issue which this court expressly says was not before the Circuit Court of Appeals. This court says in its opinion:

> "For the proper construction of the decree under consideration, regard is to be had to the issues be-

> fore the court on appeal, the findings applied for and the directions given. *The proposed findings and additional recovery extended to matters not before the court.* * * * The merits of the claims on which they sought recovery against the Trust Company *were not before the court.*" (Italics ours.)

Nevertheless, this court says:

> "It is plain that the stockholders' application was denied and that the decree did not authorize or permit the taxation of costs as between solicitor and client."

If the former quotation correctly states the issues in the Circuit Court of Appeals, it follows that the stockholders' application was denied, not upon its merits, or because too late, but because the court could not pass upon a question which was not before it. The application there and the action taken upon it simply leave the situation as it was before—just as if the application had not been filed.

The action of the District Court in controversy in the present appeal, was based not upon the application filed in the Circuit Court of Appeals, but upon an application filed in the District Court after the case was remanded. To sustain the present decision, it must be held that the application was filed too late. If so, when should the question have been raised? How could it have been raised sooner?

A suit was filed by the Southern against a pledgor and a pledgee, claiming the pledged property. The pledgee defends and is defeated in the trial court. It appeals. The appellate court reverses the trial court and remands the case for the entry of a decree in favor

of the pledgee. The pledgee then moves that, in the decree, it be allowed its expenses in defending the pledged property. Can it be said that this is too late?

We submit, on the contrary, that this is the usual and proper procedure. It is followed in practically every foreclosure by a trustee of a mortgage or deed of trust securing bonds. The allowances are made and the costs adjudged after the entry of the decree. It has the support of all the authorities with which we are familiar.

Missouri Pacific Ry. Co. v. *Larabee*, 234 U. S. 459 (34 S. C. 979);
Ex Parte Union Steamboat Co., 178 U. S. 317;
In re Sanford Fork & Tool Co., 160 U. S. 247;
Sizer v. *Many*, 16 How. 98;
U. S. v. *Pan-American Petroleum Co.*, 24 Fed. (2d) 206;
Mills v. *Lehigh Valley R. Co.*, 226 Fed. 812;
St. Louis & San Francisco R. Co. v. *Barker*, 210 Fed. 902;
Kell v. *Trenchard*, 146 Fed. 245;
Clark v. *C. M. & St. P. Ry. Co.*, 105 Fed. 552;
Baltimore B. & L. Ass'n v. *Alderson*, 90 Fed. 489.

We think the question must be determined, not by the action taken by the Circuit Court of Appeals, on the first appeal, but on the merits of the application filed in the District Court and the authorities applicable thereto.

Respectfully submitted,

JUSTIN D. BOWERSOCK,
ROBERT B. FIZZELL,
JOHN F. RHODES,
Attorneys for Respondent.

Certificate.

I, of counsel for respondent, Guardian Trust Company, do hereby certify that in my opinion the foregoing petition is well founded in law and that the same is not made for vexation or delay.

JUSTIN D. BOWERSOCK.